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IN THE

Supreme Court of the United States

October Term, 2000

SPECIALIST HECTOR RODRIGUEZ,
United States Army,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

BRIEF OF NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The Navy-Marine Corps Appellate Defense Division respectfully submits this brief as *amicus curiae* in support of Petitioner.

INTEREST OF THE *AMICUS CURIAE*

The Navy-Marine Corps Appellate Defense Division represents Sailors and Marines on appellate review of court-

martial convictions.[1] The 3-2 decision by the United States Court of Appeals for the Armed Forces in this case is binding on all courts-martial in the Navy and Marine Corps. This Court's decision to review the lower court's decision directly impacts the rights of our current and future clients.

ARGUMENT

Specialist Rodriguez's petition properly sets forth the legal errors of the Court of Appeals' decision in this case. The Navy-Marine Corps Appellate Defense Division submits this brief for the purpose of showing (1) the lower court failed to afford the necessary deference to the President's enactment of Mil. R. Evid. 501, and (2) the effect caused by the lower court's decision on the military justice system.

1. A core principle of military justice is that the executive and legislative branches are entitled to great judicial deference in rulemaking decisions. *See Weiss v. United States*, 510 U.S. 163, 177 (1994); *Solorio v. United States*, 483 U.S. 435, 447 (1987). The genesis of this deference is Congress's authority under Article I, section 8 of the Constitution "to raise and regulate armies and navies." *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981) (citation omitted). Such deference extends equally to the President's authority under Article 36, Uniform Code of Military Justice, 10 U.S.C. § 836(a) (1994). *See Goldman v. Weinberger*, 475 U.S. 503, 508 (1986). Courts should adhere to this preferential standard absent an issue so "extraordinarily weighty as to overcome the balance struck

[1] Both parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. The United States government bore the sole financial cost of preparing this brief. No one else made a monetary contribution to the preparation or submission of this brief.

by Congress." *Weiss*, 510 U.S. at 177-78 (citation omitted).

The three-member majority in this case did not adhere to this deferential standard when it analyzed Mil. R. Evid. 501(a)(4).[2] This rule mandates that common law privileges apply to courts-martial unless they are contrary to pre-existing privileges or are inapplicable due to military exigencies. One such privilege is the psychotherapist-patient privilege recognized by this Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996).

The lower court failed to apply this privilege. The court found the psychotherapist-patient privilege inapplicable because Mil. R. Evid. 501(d) prohibits doctor-patient privileges. *See United States v. Rodriguez*, 54 M.J. 156, 160 (2000). It reasoned that the President's use of the word "physician" in Mil. R. Evid. 501(d) included psychiatrists as a whole and the psychiatrist in this case because he was a physician. *Id.* The court's rationale is unconvincing.

First, the court's interpretation of the term physician is unsupported by a reasonable reading of Mil. R. Evid. 501(d). Nothing in the rule suggests that psychotherapists or psychiatrists are included within the meaning of physicians. On the contrary, civilian and military courts have long drawn a distinction between doctor-patient privileges and psychotherapist-patient privileges. *See United States v. Demmings*, 46 M.J. 877, 882 n.9 (Army Ct. Crim. App. 1997); *see also United States v. Mansfield*, 38 M.J. 415, 418 (C.M.A. 1993) ("[t]here is no physician-patient or

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[2] This rule requires the application of privileges based on the "principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual." Mil. R. Evid. 501(a)(4).

psychotherapist-patient privilege in federal law, including military law"); *United States* v. *Tharpe*, 38 M.J. 8, 15 n.5 (C.M.A. 1993) ("[a]s in federal law, there is no physician-patient or psychotherapist-patient privilege in the military"). This Court highlighted this difference in *Jaffee* by distinguishing between the trust and confidence needed for a psychotherapist and that needed for a physician. *Jaffee*, 518 U.S. at 10.

The fact that psychotherapists are not included in the physician language of Mil. R. Evid. 501(d) is also evidenced by the President's recent enactment of a psychotherapist privilege under Mil. R. Evid. 513. Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (1999). This privilege by its own terms is distinct and separate from the physician-patient privilege prohibited by Mil. R. Evid. 501(d). Manual for Courts-Martial, United States (2000 ed.), App. 22 at A22-24. These facts show, contrary to the lower court's decision, the term physician does not include psychotherapists or psychiatrists.

Second, even if a psychotherapist falls within the term physician under Mil. R. Evid. 501(d), the plain language of that rule does not preclude the application of the psychotherapist privilege. The rule states, "Notwithstanding any other provision of these rules, information *not otherwise privileged* does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." Mil. R. Evid. 501(d) (emphasis added). Here, the psychotherapist privilege is "otherwise privileged." It is privileged by application of the common law provision of Mil. R. Evid. 501(a)(4) and this Court's decision in *Jaffee*. Moreover, because the psychotherapist privilege fits within the exception of being "otherwise privileged," it cannot be contrary to Mil. R. Evid. 501(d) as required by Mil. R. Evid. 501(a)(4). Thus, common law

privileges are not limited by 501(d) unless the privilege is impracticable in military courts-martial.

All of these facts necessitate a finding that the lower court ignored the plain meaning of Mil. R. Evid. 501(a)(4) and 501(d). Rather than applying the common law psychotherapist privilege as required by these rules, the court legislated from the bench. In so doing, the court encroached on the president's authority under 10 U.S.C. § 836 to promulgate rules of evidence. Military Rule of Evidence 501(a)(4) demonstrates the President's intent to allow the application of common law privileges in military courts-martial, unless the application of the privilege was inconsistent with pre-existing privileges or privileges excluded by the rules. The exception did not apply here. As such, this Court should grant the petition to ensure that the lower court adheres to its constitutionally mandated standard of deference to the President.

2. This Court also should grant Specialist Rodriguez's petition because of the ambiguous effect that the lower court's decision will have on privileges in the military. By interpreting the word physician to include psychotherapist, the majority of the court erroneously places the focus of privileged communication on the status of the individual being spoken to rather then the societal interest served by the privilege. *See Rodriguez*, 54 M.J. at 162 (Gierke, J., dissenting); *see also Jaffee*, 518 U.S. at 9 (the general prohibition of privileges is overcome by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth") (citations and internal citation marks omitted). This focus taken to its logical conclusion creates absurd results. As the dissenting judges noted, communication with lawyers or clergyman, who are also physicians, would not be privileged by the

application of Mil. R. Evid. 501(d). *Rodriguez*, 54 M.J. at 162 (Gierke, J., dissenting).

Ultimately, the lower court's decision creates much uncertainty for servicemembers and their attorney. Rather than knowing their communications will be protected by the privileges set forth by the President, they are left to speculate whether their communications with lawyers, psychotherapists, or clergymen will be protected. This result "is little better than no privilege at all." *Jaffee*, 518 U.S. at 18 (citation omitted).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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